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No. 03-658

IN THE

Supreme Court of the United States

JOHN DEEP,

Petitioner,

v.

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

BACKGROUND 2

THE INJUNCTION BELOW 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Review is Necessary to Resolve the Conflict Among the Circuits 5

II. Review is Necessary to End an Overly Broad Restraint on Freedom of Speech and Association 8

III. Review Is Necessary to Ensure that Lower Courts Will Not Exceed Their Authority by Enjoining Amicus' and the Public's Access to Novel Technologies Having Substantial Non-Infringing Uses 10

CONCLUSION 15

TABLE OF AUTHORITIES

Pages

Cases

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) 6

In re: Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003) 6, 11-13

California Democratic Primary v. Jones, 530 U.S. 567 (2000) 10

Eldred v. Ashcroft, 537 U.S. 186 (2000) ... 10-11, 13

Junger v. Daley, 209 F.3d 481 (6th Cir. 2000) 7

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984) ... 14

Near v. Minnesota, 283 U.S. 697 (1931) 9

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 9

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 9

Roth v. United States, 354 U.S. 476 (1957) 9

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) 6, 8, 11-12, 14

SunTrust Bank v. Houghton Mifflin Co., 252 F.3d 1165 (11th Cir.) (per curiam), *order vacated and opinion substituted*, 268 F.3d 1257 (11th Cir. 2001) 5

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 10

Turner Broadcasting System v. FCC, 512 U.S. 622 (1994) 7

United States v. O'Brien, 391 U.S. 367 (1968) 9

Constitutional and Statutory Authorities

U.S. Const. Amend. V. 14
U.S. Const. Art. I, §8, cl.8. 12
U.S. Const. Art. III, § 2, cl.1. 11
17 U.S.C. §106 12
17 U.S.C. §§302, 304 12
17 U.S.C. §502 12
17 U.S.C. §1201 12
18 U.S.C. § 1839 14
42 U.S.C. §§ 1320d-5, 1320d-6 ..... 12, 14

Other Authorities

Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1 (2002) 6. 10
1 Journals of the Continental Congress 108 (1774) 9

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INTEREST OF AMICUS CURIAE[1]

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit organization dedicated to defending the practice of private medicine. Founded in 1943, AAPS publishes a newsletter and journal and participates in litigation in furtherance of its goals of limited government and the free market. Central to the interests of AAPS are the First Amendment rights of association and speech at issue in the

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

case at bar, which are essential to limiting government encroachment on the marketplace of ideas, values, and health. In particular, AAPS is concerned that the suppression of Web sites like Aimster merely for referring internet[2] users to other information or other users is unjustified. The injunction by the court below, if upheld, will likely have a profound chilling effect on the dissemination of important therapeutic medical information to users over the internet.

BACKGROUND

The Aimster.com website offered encryption for users seeking to ensure privacy in the messages they sent to others over the internet. Once users downloaded the program, they could scramble and descramble their messages much like the set-top device does for cable television in millions of homes. The sender of the message would use the program to encrypt or scramble the contents prior to delivering it over the internet to a recipient, who could then decrypt or descramble the contents. The software performing the encryption and decryption resided on the computers of the senders and recipients.

Only the address header of the message would remain unscrambled during this process. The header is necessary for routing the message to the intended recipient. Eavesdroppers, such as foreign governments, would only be able to see the header but could not understand the contents of the message. The usefulness of this technology for protected free speech is obvious and indisputable, particularly in sending messages to victims of totalitarian regimes.

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[2] The term "internet" is, like "television" and "telephone", a non-trademarked generic name for a pervasive new technology, and thus we follow the growing trend against capitalizing it.

Aimster included features that facilitated its ease-of-use and popularity. For example, Aimster allowed users to establish their own "Buddy List" so that they could send automatically and transparently encrypted messages to each other. Users could also find new "buddies" through an authentication procedure. This encouraged strangers to meet each other over the internet, hold discussions, and share documents in private networks consisting of those who were properly authenticated. This service was similar to AOL's instant messaging service, but more powerful.

Little to no support of users by Aimster.com was needed or offered. Nevertheless, message routers were soon handling up to 100,000 messages per minute, dwarfing even the United States Post Office in volume.

Aimster offered its service to the recording industry, but some responded by suing Aimster to prevent potentially illegal copying of music. The district court enjoined continuation of the service without even holding an evidentiary hearing, and the Seventh Circuit affirmed on novel and untenable legal theories. Without precedent, the Court upheld a broad restraint on free speech based on the argument that Aimster had not suggested a narrower alternative. This violates the First Amendment and conflicts with the rulings in other Circuits. AAPS supports the petition for certiorari by Aimster's owner, John Deep.

THE INJUNCTION BELOW

The decision below affirmed the following injunction:

> Aimster is preliminarily enjoined from directly, indirectly, contributorily, or vicariously infringing in any manner any and all sound recordings and musical compositions (or portions thereof) protected by federal or state law, whether now in existence or

later created, in which Plaintiffs (and any parents, subsidiaries, or affiliates of Plaintiffs) own or control and exclusive right to reproduce, distribute, or transmit ('Plaintiffs' Copyrighted Works')."

Aimster shall immediately disable and prevent any and all access by any person or entity ("User") to any of Plaintiffs' Copyrighted Works available on, over, through, or via any website, server, hardware, software, or any other system or service owned or controlled by Aimster (the "Aimster System and Service"), including, if necessary, preventing any and all access to the Aimster System and Service in its entirety, until such time that Aimster implements measures that prevent any and all copying, downloading, distributing, uploading, linking to, or transmitting of Plaintiffs' Copyrighted Works on, over, through, or via the Aimster System and Service.

(Preliminary Injunction Order at ¶¶1- 2).

SUMMARY OF ARGUMENT

This court below infringed on First Amendment rights in affirming an overly broad injunction against a promising new service. In so doing, the court conflicted with the Sixth, Ninth and Eleventh Circuits. Review is essential here to resolve the conflict and restore the free speech rights of petitioner.

The injunction against petitioner is a prior restraint on free speech that would not and should not survive scrutiny outside of the Seventh Circuit. Without even an evidentiary hearing, petitioner is completely muzzled and prevented from allowing access by others to his innovative software. Like most forms of censorship, the harm extends far beyond the petitioner. Political activists, dissidents, physicians, patients, lawyers and clients alike are injured by the wholesale removal of petitioner's system for encrypted communications.

The potential of 100,000 encrypted messages per minute, made possible by petitioner's Aimster software and network, is enormously positive for the United States and particularly for foreign countries lacking in free speech. The court below, however, suppressed this marvelous innovation before it had a chance to prove its value. The court below invented standards in direct conflict with the other Circuits and inconsistent with the teachings of this Court. The Petition for Writ of Certiorari should be granted.

ARGUMENT

I. REVIEW IS NECESSARY TO RESOLVE THE CONFLICT AMONG THE CIRCUITS.

The decision below conflicts with the Sixth, Ninth and Eleventh Circuits with respect to new technology and prior restraints. The expansive scope of the prior restraint imposed by the Seventh Circuit violated the First Amendment and conflicted with the other Circuits by enjoining the circulation of software to anyone who might use it in a copyright infringing manner. "Aimster shall immediately disable and prevent any and all access by any person or entity ("User") to any of Plaintiffs' Copyrighted Works available on, over, through, or via any ... software." Preliminary Injunction Order at ¶2.

The Eleventh Circuit, when confronted with a prior restraint on publication of *The Wind Done Gone*, initially ruled from the bench that it was "manifest" that the injunction was an "unlawful prior restraint in violation of the First Amendment." *SunTrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165, 1166 (11th Cir.) (per curiam), *order vacated and opinion substituted*, 268 F.3d 1257 (11th Cir. 2001). It later issued a lengthy opinion that adhered to its initial view that the injunction to protect a copyright holder amounted to an unjustified "prior restraint." 268 F.3d at 1277. There, as here, a copyright holder demanded a prior

restraint and the district court had incorrectly overlooked First Amendment concerns in issuing a broad injunction. *See generally* Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1 (2002).

The decision below also conflicts with the ruling of the Ninth Circuit in its second *Napster* decision. "[T]he Ninth Circuit erred in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001)." *In re: Aimster Copyright Litigation*, 334 F.3d 643, 649 (7th Cir. 2003). ("*In re: Aimster*") The Seventh Circuit enjoined a promising new technology without any proof of actual knowledge of infringement. This conflicts with the Ninth Circuit and with the ruling of this Court in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony*"). "We are bound to follow *Sony*, and will not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs' copyrights." 239 F.3d at 1020-21 (citing *Sony*, 464 U.S. at 436, which rejected the proposition that merely supplying the "'means' to accomplish an infringing activity" justifies imposing liability).

The decision below conflicts directly with the *Napster* ruling by the Ninth Circuit in completely enjoining the Aimster software without the requisite knowledge of infringement. The Ninth Circuit held that "absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use, in suggesting that actual knowledge of specific infringing uses is a sufficient condition for deeming a facilitator a contributory infringer." 239 F.3d at 1021 (citing *Sony*, 464 U.S. at 436, 442-43).

The Seventh Circuit expressly held opposite to the Ninth Circuit.

The decision below also conflicts with the Sixth Circuit, which recognized free speech protection for computer software, including encryption. The Sixth Circuit held that "[b]ecause computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment." *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000). In holding in favor of a programmer, it rejected the argument that conjectural harm, even to national interests, justifies regulations on computer software. It applied intermediate scrutiny to restraints on software, allowing restrictions only if "it furthers an important or substantial governmental interest." *Id.* at 485 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). "The government 'must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" 209 F.3d at 485 (quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 664 (1994)).

Finally, the court below conflicted with all other Circuits in holding that petitioner somehow waived his free speech rights by failing to suggest a narrower form of the prior restraint. The lower court declared that petitioner "has waived the objection" to the prior restraint by failing "to suggest alternative language either in the district court or in this court." 334 F.3d at 656. The court conceded that it "cannot find a case that makes this point expressly," but then declares the objection to be waived regardless. *Id.* That new holding is akin to declaring that a criminal defendant waives his right to challenge a lengthy sentence if he failed to propose a less onerous one. No one waives basic rights by refraining from agreeing to a compromise. The very essence of asserting a constitutional right, particularly the right to free speech, is to oppose any infringement.

Congress, not the courts, is the proper venue for addressing new technologies like Aimster. When the video cassette recorder (VCR) was developed and introduced in the market, and widespread unauthorized copying of broadcasts became commonplace, the Supreme Court pointedly refused to interpret the law in a way that would stifle a new technology, saying that only Congress should do that. "Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary." *Sony*, 464 U.S. at 430-31. Later, Congress refused to pass a law limiting the sales or use of VCRs, thereby confirming the wisdom of the Court's forbearance. Here, Aimster has developed a technology facilitating confidential communications, forbearance by the courts is appropriate.

Review is essential here to resolve the conflict among the Circuits over the scope of prior restraints.

II. REVIEW IS NECESSARY TO END AN OVERLY BROAD RESTRAINT ON FREEDOM OF SPEECH AND ASSOCIATION.

Petitioner objected below to the astounding breadth of the injunction, which mandated that "Aimster shall immediately disable and prevent any and all access by any person or entity ("User") to any of Plaintiffs' Copyrighted Works available on, over, through, or via any website, server, hardware, software, or any other system or service owned or controlled by Aimster ...." Preliminary Injunction Order at ¶2. The injunction then shifted the burden to petitioner to "prevent any and all copying, downloading, distributing, uploading, linking to, or transmitting of Plaintiffs' Copyrighted Works on, over, through, or via the Aimster System and Service." *Id.* The court below held, without any precedent or logical justification, that petitioner waived any rights to object to this broad injunction by failing to agree to a narrower alternative. 334 F.3d at 656

This prior restraint on speech is untenable. "Any prior restraint on expression comes ... with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The injunction against John Deep is an example of a "prior restraints on speech and publication [that is] the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The Supreme Court has emphasized that "it is the chief purpose of the [First Amendment] guaranty to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). "[A]ll ideas having even the slightest redeeming social importance," such as those concerning "the advancement of truth, science, morality, and arts" enjoy the full protection of the First Amendment. *Roth v. United States*, 354 U.S. 476 (1957) (quoting 1 Journals of the Continental Congress 108 (1774)). *See also United States v. O'Brien*, 391 U.S. 367 (1968).

Many uses of Aimster are inevitably valuable and noninfringing. Visitors to the website who find and copy music lacking any copyright restriction against such use would be engaging in noninfringing activity. The service could be used for any files, not only music, and could even be beneficial in joint efforts to draft legal briefs. Encrypted speech by dissidents in foreign countries is worth protecting and not in violation of respondents' copyrights. The injunction below, however, operates to prevent perfectly lawful activity in addition to arguably infringing activity. The court placed the burden on Aimster to guarantee that no copying, not even fair use copying, can occur without authorization. This impossible standard unnecessarily chills Aimster (and similar websites) from facilitating lawful activity, and thereby constitutes an unconstitutionally overbroad injunction.

Even if there were a compelling interest to restrict the rights of Aimster and its visitors, such restraints

must be narrowly tailored to such interest. *California Democratic Primary v. Jones*, 120 S. Ct. 2402 (2000). "'Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest.'" *Id.* at 2412 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Professor Rubenfeld laments that "[c]opyright law blithely ignores at least three basic principles of free speech jurisprudence that elsewhere go without saying," including the "First Amendment principle ... against prior restraints." *Freedom of Imagination*, *supra*, at 5-6. "In some parts of the world, you can go to jail for reciting a powem in public without permission from state-licensed authorities. Where is this true? One place is the United States of America." *Id.* at 3 (footnote omitted).

Aimster offers remarkable promise for promoting and fostering political dialog, in the United States and under totalitarian regimes in foreign countries. Aimster facilitates communication by email beyond scrutiny by any governmental authority. Enjoining this technology is misguided and obstructs political progress. And if such an attempt is to be pursued, Congress would be the better forum for weighing the various issues and reaching a compromise. Blanket prior restraints against technologies facilitating this speech are unjustified, particularly in the absence of an evidentiary hearing in this case.

III. REVIEW IS NECESSARY TO ENSURE THAT LOWER COURTS WILL NOT EXCEED THEIR AUTHORITY BY ENJOINING AMICUS' AND THE PUBLIC'S ACCESS TO NOVEL TECHNOLOGIES HAVING SUBSTANTIAL NON-INFRINGING USES.

This case further concerns the authority the Constitution assigns to courts to expand the scope of copyrights. Cf. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) ("concern[ing] the authority the Constitution assigns to Congress to prescribe the duration of copyrights") (Id.

at 192). The Constitution assigns Article III courts no such authority, limiting their authority to the resolution of cases and controversies. Const. Art. III, § 2, cl.1. The courts below acted beyond their authority by expanding the scope of plaintiffs'/respondents' copyrights, now to include a novel right to enjoin the distribution of software capable of substantial noninfringing uses. See *In re: Aimster*, 334 F.3d at 645 (affirming a broad preliminary injunction, which had the effect of shutting down the Aimster service); see also *Id.* at 652 (allowing for "the possibility of substantial noninfringing uses of the Aimster system"). Moreover, given this Court's decision in *Sony*, courts have no authority under the Copyright Act to enjoin the distribution of a device capable of substantial noninfringing uses. *See generally Sony*, 464 U.S. 417. By upholding just such an injunction, 334 F.3d at 656, the opinion of the Court of Appeals for the Seventh Circuit contradicts *Sony*. After *Eldred* and *Sony*, it should therefore be a settled question that Congress alone has the authority to expand the scope of copyright, and that courts may not invoke the Copyright Act to enjoin the distribution of devices having substantial noninfringing uses. Because the opinion of the Seventh Circuit ignores and attempts to rewrite settled law, thereby chilling technology development and altering the contours of property rights at the expense of *Amicus* and the public, *Amicus* urges this Court to grant certiorari.

With respect to the proper division of authority that comports with the Constitution, this Court has recently reminded "that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred*, 186 U.S. at 212-213. Congress has seen fit to enumerate a set of exclusive rights belonging to the copyright owner, 17 U.S.C. §106, and has recently adjusted the temporal, 17 U.S.C. §§ 302, 304, and substantive, 17 U.S.C. § 1201, scope of these rights in accordance with the constitutional grant of authority to Congress. U.S. Const. Art.

I, § 8, cl.8. Under the Constitution, then, expansion of this set of rights is the exclusive prerogative of Congress.

In the instant case, copyright owners have sought to enjoin petitioner from distributing petitioner's software, software which is plainly capable of substantial noninfringing uses. *In re: Aimster*, 334 F.3d at 651 (concluding Aimster's file-sharing system "obviously" could be used "in non-infringing ways"). While the Copyright Act grants courts authority to fashion injunctive relief appropriate to the circumstances of the case, 17 U.S.C. § 502, nowhere does the Copyright Act state that the distribution of noninfringing works or devices may be enjoined. Moreover, this Court in *Sony* has limited the authority of courts under the Copyright Act to fashion relief that would enjoin the distribution of devices capable of substantial noninfringing uses. *Sony*, 464 U.S. at 442. The disposition of petitioner's case by the courts below, which have enjoined the distribution of software capable of substantial noninfringing uses, exceeds the constitutional authority of these courts under the Copyright Act as interpreted by this Court in Sony.

The interest of *Amicus* in this urgent issue of national importance should be clear. The privacy of the doctor-patient relationship is so important that Congress has recently seen fit to offer a legislative scheme for ensuring privacy of patient health records. See, e.g., 42 U.S.C. §§ 1320d-5, 1320d-6 (imposing penalties for civil and criminal violations, respectively, involving wrongful disclosure of individually identifiable health information). While *Amicus* is troubled by certain details of the implementation of this scheme, there is no doubt that the privacy interest is one of paramount importance. The software distributed by petitioner enabled its users to engage in encrypted private communications with one another. 334 F.3d at 464 ("All communications back and forth are encrypted by the sender . . . and decrypted by the recipient.").

Members of *Amicus* have occasion every day to engage in private communications with their patients and with one another concerning practical details of health care to be provided these patients. Encryption of such communications ensures a higher and more secure degree of privacy to such communications. A high degree of privacy in these communications is acknowledged to be a social good, and it is merely a question of how best to achieve this good. Petitioner's software offered an elegant and inexpensive way to achieve such privacy, and *Amicus* and the public are now harmed by being deprived of its use due to the far-reaching and constitutionally unauthorized decisions of the courts below.

The interests of *Amicus* and those of the public are in fact closely aligned or identical in certain aspects of the instant case. When deciding whether the *temporal* scope of copyrights was to be expanded, Congress had to consider the effect on third parties, whose rights would be limited by the expansion of such scope. Eldred, 537 U.S. at 206-207. In the instant case, which concerns the *substantive* scope of copyrights, no evidentiary hearing was held, 334 F.3d at 653, which would have offered the court below some understanding of the interests of third parties to be harmed by an overbroad injunction, such as the one which issued and is in controversy here. For privacy reasons, *Amicus* does not know with certainty whether any of its members were users of petitioner's software. However, the number of users of petitioner's software was large enough -- evidently in the millions -- that there is reason to believe that members of *Amicus* may have been users. On this view, members of *Amicus* were communicating with one another in a private encrypted network enabled by petitioner's software, distribution of which is now enjoined by the trial court as affirmed by the Seventh Circuit.

The establishment and maintenance, by members of *Amicus*, of such a private encrypted network, within

which information of value for health care is communicated, constitutes a form of intellectual property. *See, e.g.*, 18 U.S.C. § 1839 (defining "trade secret" as information kept secret and from which economic value is derived by virtue of its being kept secret). There can be no doubt that there is substantial economic value in maintaining the privacy of medical information. *See, e.g.*, 42 U.S.C. §§ 1320d-5, 1320d-6. An injunction such as the one at issue in the instant case, in which distribution of software enabling the privacy of medical information is enjoined, deprives individuals, including members of *Amicus*, of their property while expanding respondents'/copyright holders' rights. The rights of members of *Amicus* and of the public are substantially affected by such injunctions, which is the reason such broad injunctions are disfavored and indeed found, under *Sony*, to be beyond courts' authority to impose under the Copyright Act. See generally *Sony*, 464 U.S. 417. Deprivation of Amicus' members, and of the public, of their property, without notice, or a hearing, or any sort of compensation, exceeds the authority of any agency of government, Const. Amend. V; *see also Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (permitting suit to recover compensation for trade secret compelled to disclose trade secret to government agency), especially a court purporting to act under a statute by which Congress confers limited rights to certain individuals.

Because the courts below have exceeded their authority by enjoining the distribution of software capable of substantial noninfringing uses, and because the interests of Amicus and of the public are harmed by this impermissible injunction, Amicus urges that certiorari be granted in the instant case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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